

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.04.2017

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THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Cr1.O.P No.23323 of 2009

and

M.P.No.1 of 2009

C.Sembian Sivakumar Petitioner/Accused

vs.

N.K.Karuppasamy Respondent/Complainant

Prayer: Criminal Original Petitions filed under Section 482 of Cr.P.C., to call for the records in C.C.No.321 of 2008, on the file of the Judicial Magistrate, Gobichettipalayam and quash the same.

For Petitioner : Mr.B.K.Girish Neelakantan

For Respondent : No Appearance

JUDGMENT

The petition is filed seeking to quash a private complaint filed by the respondent herein under Section 200 of CrPC before the Learned Judicial Magistrate Gopicheetipalayam, seeking to punish the petitioner for the alleged offences under Section 292 (A) and 293 of Indian Penal Code and r/w Sections 3 and 4 of Indecent Representation of Women (Prohibition) Act, 1986. The above private complaint is baseless and unsustainable in the eyes of law and fact. However, the Learned Judicial Magistrate has taken cognizance of the above complaint in C.C.No.321 of 2008 and issued Summons to the petitioner.

2.It is the case of the petitioner that he is the Editor cum Publisher of the Tamil Daily Newspaper namely "Dinakaran", which is a predominant Daily News paper in the state of Tamil Nadu. While so, in usual course of their business of reporting news, three news items dated 25.05.2007, 30.05.2007 and 31.07.2007 stood reporting the World Beauty Contest and cine news in their news items with the pictures. The above news on conduction of beauty contest along with their pictures also

remained published in other newspapers, magazines and TV channels. However, the respondent herein with an ulterior motive and on extraneous reasons has filed the above private complaint under Section 200 of Cr.P.C. as if the above news publications were obscene and as if it attract offences under Section 292 (A) and 293 of Indian Penal Code and r/w Sections 3 and 4 of Indecent Representation of Women (Prohibition) Act, 1986.

3.The said complaint is an abuse of process of Law, since the complaint was baseless and the news items published was neither obscene nor indecent representation of women. Further the said complaint was meant to harass the petitioner for extraneous reasons, besides affecting the Fundamental Rights of the petitioner guaranteed under Article 19(1)(a) of Indian Constitution. However, the learned Judicial Magistrate without proper appreciation of the Law and the facts involved in the case, has mechanically taken the complaint lodged by the respondent in C.C.No.321 of 2008 and has issued the summons in a routine manner. Therefore the present Criminal Original Petition under Section 482 of Cr.P.C. is being filed to quash the further proceedings in C.C.No.321 of 2008 as the same was abuse of process of Law.

4.I heard Mr.B.K.Girish Neelakantan, learned counsel appearing for the petitioner and no representation on behalf of the respondent and relevant records are perused.

5.The learned counsel for the petitioner would submit that the pictures of the beauty contestants and the cine actress published in the petitioner newspaper cannot be taken to be obscene by any stretch of imagination. The picture in question is a very routine and ordinary picture of the beauty contestant and the publication of the beauty contest can only be termed as reporting of news and not as obscene as alleged by the respondent.

6.Furthermore the above news items were also published in almost all other daily newspapers, whereas the respondent's complaint as against the petitioner alone is for extraneous reason and hence the complaint against the petitioner is unsustainable and the same is with an ulterior motive to harass the petitioner.

7.The learned counsel for the petitioner would further submit that the petitioner being a Editor of a reputed newspaper is guaranteed with fundamental rights of freedom of press, which

forms part of the freedom of speech and expression under Article 19(1) (a) of Indian Constitution. The valuable right guaranteed to the petitioner, namely, the freedom of speech and expression under Article 19(1) (a) of the Constitution which includes the freedom of the press and freedom to circulate their magazine as also the liberty of publishing such material which flows from Article 21 of the Constitution, has been deprived. Further the pictures put forth by the respondent is not obscene and the same hence do not attract any offence as alleged by the respondent.

8. It is submitted that the respondent being an Advocate and in public life as a politician driven by social obligation to prevent the commission of offence of publishing obscene news items has preferred the complaint to curb the tendency of the petitioner newspaper to publish obscene picture. The publication of the postures of beauty contestants who reportedly the participants of the world beauty contest in Mexico are obscene, randy, stroke and kindle sexual passion in any person. Such postures tend to deprave and corrupt the young minds, besides utter disregard to the ancient and pristine glory of Tamil culture. Therefore the petitioner being the editor and publisher of the daily newspaper is responsible for the publication of such obscene and thus involved in the offences punishable under Sections 292 (A) and 293 of Indian Penal Code and r/w Sections 3 and 4 of Indecent Representation of Women (Prohibition) Act, 1986.

9. Now the question arose before this Court is as to whether the posture of the beauty contestant is obscene or otherwise. For better appreciation of the same it would be relevant to look into a decision of the Hon'ble Apex Court in the matter of Aveek Sarkar & Anr. v. State of West Bengal And Anr. in Criminal Appeal No.902 of 2004, wherein an identical situation was dealt with by the Hon'ble Apex Court. The relevant portion is extracted hereunder:

" TEST OF OBSCENITY AND COMMUNITY STANDARDS

12. Constitution Bench of this Court in the year 1965 in Ranjit D. Udeshi (supra) indicated that the concept of obscenity would change with the passage of time and what might have been "obscene" at one point of time would not be considered as obscene at a later period. Judgment refers to several examples of changing notion of obscenity and ultimately the Court observed as follows :-

".... The world, is now able to tolerate much more than formerly, having coming indurate by literature of different sorts. The attitude is not

yet settled...." This is what this Court has said in the year 1965.

13. Again in the year 1969, in Chandrakant Kalyandas Kakodar (supra), this Court reiterated the principle as follows:-

"The standards of contemporary society in India are also fast changing."

14. Above mentioned principle has been reiterated in Samresh Bose Vs Amal Mitra (1985) 4 SCC 289 by laying emphasis on contemporary social values and general attitude of ordinary reader. Again in 2010, the principle of contemporary community standards and social values have been reiterated in S. Kushboo V Kanniammal (2010) 5 SCC 600.

15. This Court in Ranjit D. Udeshi (supra) highlighted the delicate task to be discharged by the Courts in judging whether the word, picture, painting, etc. would pass the test of obscenity under Section 292 of the Code and the Court held as follows :

"The Penal code does not define the word obscene and this delicate task of how to distinguish between that which is artistic and that which is obscene has to be performed by Courts, and in the last resort by the Supreme Court. The test must obviously be of a general character but it must admit of a just application from case to case by indicating a line of demarcation not necessarily sharp but sufficiently distinct to distinguish between that which is obscene and that which is not. None has so far attempted a definition of obscenity because the meaning can be laid bare without attempting a definition by describing what must be looked for. It may, however, be said at once that treating with sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more. The test of obscenity must square with the freedom of speech and expression guaranteed under our Constitution. This invites the Court to reach a decision on a constitutional issue of a most far reaching character and it must beware that it may not lean too far away from the guaranteed freedom."

16. Applying the above test, to the book "Lady Chatterley's Lover", this Court in Ranjit D. Udeshi (supra) held that in treating with sex the impugned portions viewed separately and also in the setting of the whole book passed the permissible limits judged

of from our community standards and there was no social gain to the public which could be said to preponderate the book must be held to satisfy the test of obscenity.

17. The novel "Lady Chatterley's Lover" which came to be condemned as obscene by this Court was held to be not obscene in England by Central Criminal Court. In England, the question of obscenity is left to the Jury. Byrne, J., learned Judge who presided over the Central Criminal Court in R. v. Penguin Books Ltd. (1961 Crim. Law Review 176) observed as follows :-

"In summing up his lordship instructed the jury that: They must consider the book as a whole, not selecting passages here and there and, keeping their feet on the ground, not exercising questions of taste or the functions of a censor. The first question, after publication was: was the book obscene? Was its effect taken as a whole to tend to deprave and corrupt persons who were likely, having regard to all the circumstances, to read it? To deprave meant to make morally bad, to pervert, to debase or corrupt morally. To corrupt meant to render morally unsound or rotten, to destroy the moral purity or chastity, to pervert or ruin a good quality, to debase, to defile. No intent to deprave or corrupt was necessary. The mere fact that the jury might be shocked and disgusted by the book would not solve the question. Authors had a right to express themselves but people with strong views were still members of the community and under an obligation to others not to harm them morally, physically or spiritually. The jury as men and women of the world, not prudish but with liberal minds, should ask themselves was the tendency of the book to deprave and corrupt those likely to read it, not only those reading under guidance in the rarefied atmosphere of some educational institution, but also those who could buy the book for three shillings and six pence or get it from the public library, possibly without any knowledge of Lawrence and with little knowledge of literature. If the jury were satisfied beyond reasonable doubt that the book was obscene, they must then consider the question of its being justified for public good in the interest of science, literature, art or learning or other subjects of general concern. Literary merits were not sufficient to save the book, it must be justified as being for the public good. The book was not to be judged by comparison

with other books. If it was obscene then if the defendant has established the probability that the merits of the book as a novel were so high that they outbalanced the obscenity so that the publication was the public good, the jury should acquit."

18. Later, this Court in Samaresh Bose (supra), referring to the Bengali novel "Prajapati" written by Samaresh Bose, observed as follows :-

"35. We are not satisfied on reading the book that it could be considered to be obscene. Reference to kissing, description of the body and the figures of the female characters in the book and suggestions of acts of sex by themselves may not have the effect of depraving, debasing and encouraging the readers of any age to lasciviousness and the novel on these counts, may not be considered to be obscene. It is true that slang and various unconventional words have been used in the book. Though there is no description of any overt act of sex, there can be no doubt that there are suggestions of sex acts and that a great deal of emphasis on the aspect of sex in the lives of persons in various spheres of society and amongst various classes of people, is to be found in the novel. Because of the language used, the episodes in relation to sex life narrated in the novel, appear vulgar and may create a feeling of disgust and revulsion. The mere fact that the various affairs and episodes with emphasis on sex have been narrated in slang and vulgar language may shock a reader who may feel disgusted by the book does not resolve the question of obscenity....." We have already indicated, this was the contemporary standard in the year 1985.

19. We are, in this case, concerned with a situation of the year 1994, but we are in 2014 and while judging as to whether a particular photograph, an article or book is obscene, regard must be had to the contemporary mores and national standards and not the standard of a group of susceptible or sensitive persons.

HICKLIN TEST:

20. In the United Kingdom, way back in 1868, the Court laid down the Hicklin test in Regina v. Hicklin (1868 L.R. 2 Q.B. 360), and held as follows :-

"The test of obscenity is whether the tendency of

the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall."

21. Hicklin test postulated that a publication has to be judged for obscenity based on isolated passages of a work considered out of context and judged by their apparent influence on most susceptible readers, such as children or weak-minded adults. United States, however, made a marked departure. Of late, it felt that the Hicklin test is not correct test to apply to judge what is obscenity. In *Roth v. United States* 354 U.S. 476 (1957), the Supreme Court of United States directly dealt with the issue of obscenity as an exception to freedom of speech and expression. The Court held that the rejection of "obscenity" was implicit in the First Amendment. Noticing that sex and obscenity were held not to be synonymous with each other, the Court held that only those sex-related materials which had the tendency of "exciting lustful thoughts" were found to be obscene and the same has to be judged from the point of view of an average person by applying contemporary community standards.

22. In Canada also, the majority held in *Brodie v. The Queen* (1962 SCR 681) that D.H. Lawrence's novel "Lady Chatterley's Lover" was not obscene within the meaning of the Canadian Criminal Code

23. The Supreme Court of Canada in *Regina v. Butler* (1992) 1 SCR 452, held that the dominant test is the "community standards problems test". The Court held that explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in the Canadian society and will not qualify as the undue exploitation of sex unless it employs children in its production. The Court held, in order for the work or material to qualify as 'obscene', the exploitation of sex must not only be a dominant characteristic, but such exploitation must be "undue". Earlier in *Towne Cinema Theatres Ltd. v. The Queen* (1985) 1 SCR 494, the Canadian Court applied the community standard test and not Hicklin test.

COMMUNITY STANDARD TEST:

24. We are also of the view that Hicklin test is not the correct test to be applied to determine "what is obscenity". Section 292 of the Indian Penal Code, of course, uses the expression 'lascivious and prurient interests' or its effect. Later, it has also been

indicated in the said Section of the applicability of the effect and the necessity of taking the items as a whole and on that foundation where such items would tend to deprave and corrupt persons who are likely, having regard to all the relevant circumstances, to read, see or hear the matter contained or embodied in it. We have, therefore, to apply the "community standard test" rather than "Hicklin test" to determine what is "obscenity". A bare reading of Sub-section (1) of Section 292, makes clear that a picture or article shall be deemed to be obscene (i) if it is lascivious; (ii) it appeals to the prurient interest, and (iii) it tends to deprave and corrupt persons who are likely to read, see or hear the matter, alleged to be obscene. Once the matter is found to be obscene, the question may arise as to whether the impugned matter falls within any of the exceptions contained in Section. A picture of a nude/semi-nude woman, as such, cannot per se be called obscene unless it has the tendency to arouse feeling or revealing an overt sexual desire. The picture should be suggestive of deprave mind and designed to excite sexual passion in persons who are likely to see it, which will depend on the particular posture and the background in which the nude/semi-nude woman is depicted. Only those sex-related materials which have a tendency of "exciting lustful thoughts" can be held to be obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards.

MESSAGE AND CONTEXT

25. We have to examine the question of obscenity in the context in which the photograph appears and the message it wants to convey. In Bobby Art International V Om Pal Singh Hoon (1996) 4 SCC 1, this Court while dealing with the question of obscenity in the context of film called Bandit Queen pointed out that the so-called objectionable scenes in the film have to be considered in the context of the message that the film was seeking to transmit in respect of social menace of torture and violence against a helpless female child which transformed her into a dreaded dacoit. The Court expressed the following view :-

"First, the scene where she is humiliated, stripped naked, paraded, made to draw water from the well, within the circle of a hundred men. The exposure of her breasts and genitalia to those men

is intended by those who strip her to demean her. The effect of so doing upon her could hardly have been better conveyed than by explicitly showing the scene. The object of doing so was not to titillate the cinemagoer's lust but to arouse in him sympathy for the victim and disgust for the perpetrators. The revulsion that the Tribunal referred to was not at Phoolan Devi's nudity but at the sadism and heartlessness of those who had stripped her naked to rob her of every shred of dignity. Nakedness does not always arouse the baser instinct. The reference by the Tribunal to the film "Schindler's List" was apt. There is a scene in it of rows of naked men and women, shown frontally, being led into the gas chambers of a Nazi concentration camp. Not only are they about to die but they have been stripped in their last moments of the basic dignity of human beings. Tears are a likely reaction; pity, horror and a fellow-feeling of shame are certain, except in the pervert who might be aroused. We do not censor to protect the pervert or to assuage the susceptibilities of the over-sensitive. "Bandit Queen" tells a powerful human story and to that story the scene of Phoolan Devi's enforced naked parade is central. It helps to explain why Phoolan Devi became what she did: her rage and vendetta against the society that had heaped indignities upon her." [Emphasis Supplied]

26. In *Ajay Goswami -Vs- Union of India* (2007) 1 SCC 143, while examining the scope of Section 292 IPC and Sections 2, 4 and 6 of the Indecent Representation of Women (Prohibition) Act, 1986, this Court held that the commitment to freedom of expression demands that it cannot be suppressed, unless the situations created by it allowing the freedom are pressing and the community interest is endangered.

27. We have to examine whether the photograph of Boris Becker with his fiancée Barbara Fultus, a dark-skinned lady standing close to each other bare bodied but covering the breast of his fiancée with his hands can be stated to be objectionable in the sense it violates Section 292IPC. Applying the community tolerance test, we are not prepared to say such a photograph is suggestive of deprave minds and designed to excite sexual passion in persons who are likely to look at them and see them, which would depend upon the particular posture and background in which the woman is depicted or shown. Breast of Barbara Fultus has been fully covered with the arm of

Boris Becker, a photograph, of course, semi-nude, but taken by none other than the father of Barbara. Further, the photograph, in our view, has no tendency to deprave or corrupt the minds of people in whose hands the magazine Sports World or Anandabazar Patrika would fall.

28. We may also indicate that the said picture has to be viewed in the background in which it was shown, and the message it has to convey to the public and the world at large. The cover story of the Magazine carries the title, posing nude, dropping of harassment, battling racism in Germany. Boris Becker himself in the article published in the German magazine, speaks of the racial discrimination prevalent in Germany and the article highlights Boris Becker's protests against racism in Germany. Boris Becker himself puts it, as quoted in the said article:

"the nude photos were supposed to shock, no doubt about it..... What I am saying with these photos is that an inter-racial relationship is okay."

29. The message, the photograph wants to convey is that the colour of skin matters little and love champions over colour. Picture promotes love affair, leading to a marriage, between a white-skinned man and a black skinned woman.

30. We should, therefore, appreciate the photograph and the article in the light of the message it wants to convey, that is to eradicate the evil of racism and apartheid in the society and to promote love and marriage between white skinned man and a black skinned woman. When viewed in that angle, we are not prepared to say that the picture or the article which was reproduced by Sports World and the Anandabazar Patrika be said to be objectionable so as to initiate proceedings under Section 292 IPC or under Section 4 of the Indecent Representation of Women (Prohibition) Act, 1986.

31. We have found that no offence has been committed under Section 292 of IPC and then the question whether it falls in the first part of Section 79 of IPC has become academic. We are sorry to note that the learned Magistrate, without proper application of mind or appreciation of background in which the photograph has been shown, proposed to initiate prosecution proceedings against the Appellants. Learned Magistrate should have exercised his wisdom on the basis of judicial precedents in the event of

which he would not have ordered the Appellants to face the trial. The High Court, in our view, should have exercised powers under Section 482 Cr.P.C. to secure the ends of justice."

10. On careful perusal of the above dictum laid down by the Hon'ble Apex Court it is needless to say that always a posture on an alleged obscenity shall be looked into along with the background in which the same came to be published.

11. I have also perused the photographs which alleged to be published, but such photographs suggested of deprave mind and designed to excite sexual passion in persons. It is made clear that the said picture have been viewed in the background in which it was shown, and the message it has to convey to the public and the world at large. The picture or the article which was reproduced and the same is not attracted the proceedings under Section 292 of I.P.C. or under Section 4 of the Indecent Representation of Women (Prohibition) Act, 1986.

12. Therefore, I found that there was no offence under Section 292(A) and 293 of I.P.C. and read with Sections 3 and 4 of the Indecent Representation of Women (Prohibition) Act, 1986. It is also unfortunate that the learned Magistrate without proper application of mind or appreciation of background in which the photograph has been shown, proposed to initiate prosecution proceedings against the petitioner. Since the learned Magistrate should have exercised his wisdom on the basis of judicial precedents in the event of which he would not have ordered the petitioner to face the trial in this petition. Therefore, the filing of the petition by exercising the powers under Section 482 of Cr.P.C. is proper to secure the ends of justice.

13. Admittedly the postures herein are being published with regard to the News on conduction of World Beauty contest held at Mexico. Such publication of the beauty contest can only be termed as reporting of news and not as obscene as alleged by the respondent.

14. For the foregoing reasons and in the light of the above legal propositions the Criminal Original Petition succeeds.

15. In the result, this Criminal Original Petition is allowed and the C.C.No.321 of 2008, on the file of the learned

Judicial Magistrate, Gobichettipalayam, is hereby quashed.
Consequently, connected miscellaneous petition is closed.

Sd/-
Asst.Registrar (CS VIII)

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Sub Asst. Registrar

vs

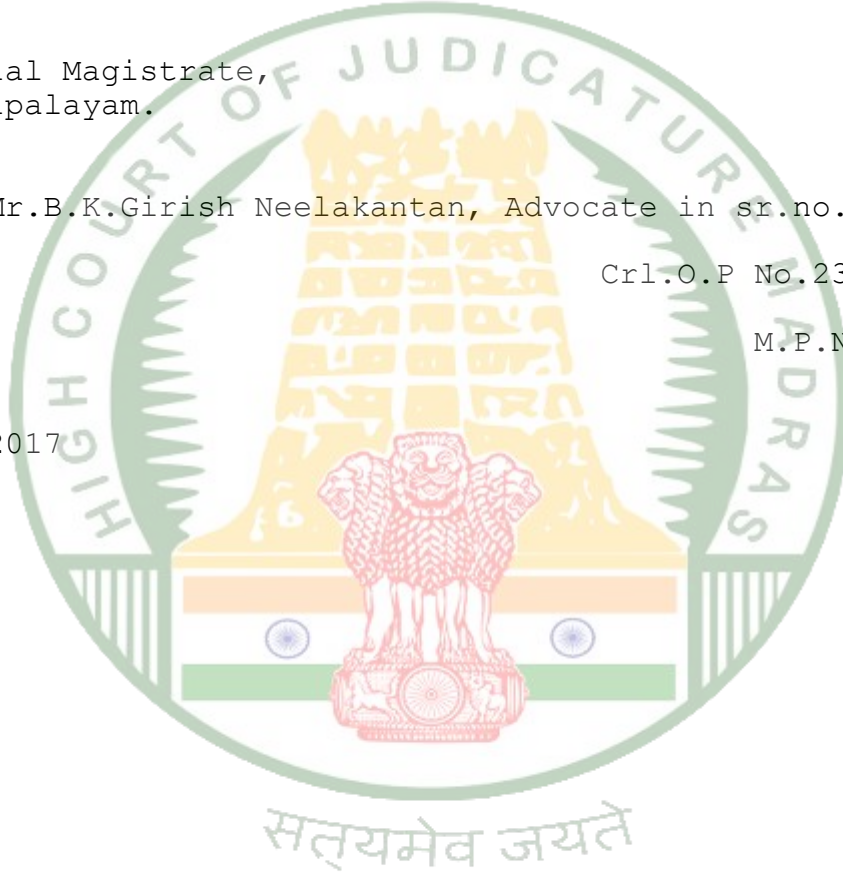
To

The Judicial Magistrate,
Gobichettipalayam.

+1cc to Mr.B.K.Girish Neelakantan, Advocate in sr.no.22903

Crl.O.P No.23323 of 2009
and
M.P.No.1 of 2009

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